

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN SALES & MANAGEMENT)		
ORGANIZATION, LLC d/b/a)		
EULEN AMERICA,)		18-1342
)		
Petitioner,)		
)		
v.)		Petition for Review
)		
NATIONAL LABOR RELATIONS)		
BOARD,)		
)		
Respondent.)		
)		

PETITION FOR REVIEW

The Petitioner, American Sales & Management Organization, LLC, d/b/a Eulen America, hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board (NLRB) entered on December 4, 2018 (NLRB Case Nos. 12-CA-163435 and 12-CA-176653).¹ Specifically, the Petitioner seeks review of the NLRB's Decision and Order which held that the Petitioner is not under the jurisdiction of the Railway Labor Act because it is not directly or indirectly controlled by a carrier.

Dated: December 28, 2018.

Respectfully submitted,

/s/ Brian Koji

Brian Koji

Florida Bar No. 0116297

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ALLEN NORTON & BLUE, P.A.

Hyde Park Plaza – Suite 225

¹ The NLRB's Decision and Order entered on December 4, 2018, is attached to this Petition. Furthermore, the NLRB's Decision and Order refers to NLRB Case Nos. 12-CA-163435 and 12-CA-176653. However, Counsel for the General Counsel of the NLRB withdrew the Charge associated with NLRB Case No. 12-CA-176653 at the evidentiary hearing before the NLRB's Administrative Law Judge. Therefore, the only relevant case number is NLRB Case No. 12-CA-163435.

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2018, I electronically filed the foregoing document with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using CM/ECF. I also certify that the foregoing document is being served this 28th day of 2018 on all counsel of record identified on the Service List in the manner specified, either *via* transmission of Notice of Electronic Filing generated by CM/ECF, *via* electronic mail, certified mail, or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**American Sales and Management Organization, LLC
d/b/a Eulen America and Service Employees In-
ternational Union, Local 32BJ. Cases 12-CA-
163435 and 12-CA-176653**

December 4, 2018

DECISION AND ORDER

**BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN**

On January 30, 2018, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, and it also filed amended exceptions and an amended supporting brief.¹ The General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board (NLRB or the Board) has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the amended exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified and set forth in full below.³

The judge found that the Respondent, a contractor providing ground handling and passenger support services to six air carriers at the Fort Lauderdale-Hollywood International Airport (FLL), is an employer within the meaning of Section 2(2) of the Act and subject to the Board's jurisdiction. The judge further found that the Respondent violated Section 8(a)(3) and (1) of the Act

¹ The Charging Party filed a motion to strike, alleging that the Respondent's exceptions failed to comply with the Board's Rules and Regulations because they contained argument. The Charging Party also asserted that the Respondent's exceptions and supporting brief should be rejected because they exceeded the page limit. On May 23, 2018, the Associate Executive Secretary wrote the Respondent stating that its filings did not comply with the Board's Rules and allowing the Respondent to resubmit its exceptions and supporting brief. Thereafter, on May 29, 2018, the Respondent filed amended exceptions and an amended supporting brief.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violation found, and we shall substitute a new notice to conform to the Order as modified.

by discharging and refusing to rehire employee Joanne Alexandre because she engaged in union activity. For the reasons set forth below, we affirm the judge's findings, but we clarify the judge's analysis of the jurisdictional issue.⁴

Facts

The Respondent is a contractor that provides a variety of services to six air carriers at FLL.⁵ The parties stipulated that the Respondent directly hires its employees, provides their pay and benefits, generates employees' work schedules, and reviews its employees' requests for time off. The parties also stipulated that the Respondent maintains and distributes an employee handbook that describes the employees' terms and conditions of employment. In addition, the record shows that the Respondent provides employees with a 900-page safety and training manual and is solely responsible for training its employees on safety matters and ensuring they receive the appropriate training as required by each carrier.⁶ About 90 percent of the Respondent's employees wear the Respondent's uniforms and badges.

The carriers retain a contractual right to audit the Respondent's cabin cleaning performance and to access the Respondent's books and records, and several carriers exercise that right. However, the carriers do not dictate how the Respondent determines staffing levels or shift assignments, and the Respondent's supervisors, not the

⁴ The Respondent filed only bare exceptions to the judge's finding that it violated Sec. 8(a)(3) and (1) by discharging and refusing to rehire employee Joanne Alexandre. Because the Respondent has not presented any argument in support of these exceptions, we find in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations that these exceptions should be disregarded. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006). Accordingly, we find it unnecessary to consider whether the judge appropriately drew an adverse inference against the Respondent for failing to call administrative assistant Jodi-Ann Pagon and former Supervisors John Marrast and Aurea Mendez to testify about the circumstances of Alexandre's discharge.

⁵ The services that the Respondent provides to carriers American Airlines, Bahamasair, Delta, Jet Blue, Spirit and WestJet at FLL include checkpoint, counter, janitorial, bag room, ramp, and cabin services.

⁶ The record shows that several carriers, including Delta and Spirit, require supplementary training programs to inform the Respondent's employees of the individual carriers' expectations for providing particular services. The Respondent's employees generally complete such training using the carriers' computers. Some of the carriers play a role in training the Respondent's trainers, and the Respondent sometimes assists the carriers in developing training programs. For example, Delta requires the Respondent to have a Delta-trained trainer instruct the Respondent's employees about how Delta expects them to clean its cabins. Although some of the supplementary training emphasizes the expectations of particular carriers, the majority of that training is federally mandated.

carriers, oversee the assignment and direction of the Respondent's employees. Apart from a handful of isolated episodes,⁷ the carriers play no role in hiring, firing, or disciplining the Respondent's employees.

Discussion

In relevant part, Section 2(2) of the Act defines the term *employer* to exclude "any person subject to the Railway Labor Act." In addition, Section 2(3) of the Act relevantly provides that the term *employee* does not include "any individual employed by an employer subject to the Railway Labor Act." The Railway Labor Act (RLA), as amended, covers

every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.

45 U.S.C. § 151 First and 181.

When an employer is not itself a carrier, the National Mediation Board (NMB) applies a two-part test to determine whether it nonetheless has jurisdiction over that employer. First, the NMB considers whether the employer performs work that is traditionally performed by carrier employees. Second, the NMB evaluates whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. The NMB has traditionally considered the following six factors in determining whether the second part of the test is satisfied: (1) the extent to which the carrier controls the manner in which a company conducts its business; (2) access to the company's operations and records; (3) the carrier's role in personnel decisions; (4) the carrier's degree of supervision; (5) the carrier's control over training; and (6) whether the employees at issue are held out to the public as employees of the carrier. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006).

As explained in our recent decision in *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, slip op. at 1 (2018), in 2013 the NMB departed from its longstanding six-factor test and began assigning greater weight to carriers' control over personnel decisions. See, e.g.,

Huntleigh USA Corp., 40 NMB 130, 137 (2013). The Board deferred to the NMB and asserted jurisdiction in cases where the NMB declined to do so under its rebalanced test. See, e.g., *Airway Cleaners, LLC*, 362 NLRB 760, 760 fn. 2 (2015). In 2017, the United States Court of Appeals for the District of Columbia Circuit criticized the NLRB and NMB for departing from the traditional six-factor test without explaining why. *ABM Onsite Services – West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017). The court found that the NMB's recent precedent overemphasized carriers' control over disciplinary decisions without explaining why that factor should be given greater weight than the others, *id.* at 1144–1146, and it criticized the NLRB for following suit "without an explanation for why it, too, was leaving behind settled precedent," *id.* at 1146. The court remanded the case, instructing the NLRB to either "attempt[] to offer its own reasoned explanation for effectively whittling down the traditional six-factor test" or "refer[] this matter to the NMB and ask[] that agency to explain its decision to change course." *Id.* at 1147.

Following the court's remand, the NLRB referred *ABM Onsite Services* to the NMB for an advisory opinion. The NMB issued an opinion reaffirming the six-factor test and also reaffirming that a carrier "must effectively exercise a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction." *ABM-Onsite Services*, 45 NMB 27, 34 (2018). In addition, the NMB emphasized that "[n]o one factor is elevated above all others in determining whether this significant degree of influence is established." *Id.* at 34–35. Applying the six-factor test, the NMB determined that the employer's operations were subject to the RLA. Thereafter, the Board deferred to the NMB's reaffirmation of its six-factor analysis and its finding of RLA jurisdiction. See *ABM Onsite Services-West*, *supra*, 367 NLRB No. 35, slip op. at 2–3.

At issue in this case is whether the Respondent is an employer under Section 2(2) of the Act or is subject to RLA jurisdiction under the NMB's reaffirmed six-factor test. In making this determination, "[t]he Board and the NMB each has independent authority to decide whether the RLA bars the [Board's] exercise of jurisdiction." *Allied Aviation Service Co. of New Jersey v. NLRB*, 854 F.3d 55, 62 (D.C. Cir. 2017); see also *Spartan Aviation Industries, Inc.*, 337 NLRB 708, 708 (2002). We find it appropriate to exercise that authority here and evaluate whether, in light of the D.C. Circuit's decision in *ABM Onsite Services* and the NMB's subsequent advisory opinion in that case, the judge correctly found that the Respondent is subject to the Board's jurisdiction. Hav-

⁷ The credited testimony establishes that the Respondent conducts its own investigations of alleged employee misconduct and makes an independent decision regarding how to respond in each case. The record shows one instance where a carrier recommended promoting an employee and another instance where a carrier recommended hiring an employee.

ing done so, we affirm the judge's conclusion that the Respondent is an employer within the meaning of Section 2(2) of the Act. However, because the judge did not separately analyze the facts of this case in light of each of the six factors the NMB applies, we shall briefly clarify the judge's analysis.⁸ As explained below, we find that five of the six factors, applied here, support a finding that the carriers do not exercise a significant degree of influence over the Respondent's operations and employees, and the Respondent is therefore subject to the Board's jurisdiction.

First, the judge found, and all parties agree, that the Respondent's employees perform work that air carriers have traditionally performed. As such, the first part of the NMB's two-part jurisdictional test is satisfied.

With respect to the second part of the test, whether an entity is controlled by a carrier, the first factor the NMB considers is the extent of carrier control over the manner in which the company does business. Here, the judge correctly found that the Respondent is solely responsible for deciding the manner in which it provides services and conducts its business. The Respondent determines its employees' terms and conditions of employment regardless of which carrier the employees are assigned to service. In addition, the Respondent provides almost all its own equipment. Because the carriers are not responsible for determining how the Respondent fulfills its contractual obligations or how the Respondent's employees perform their services, this factor weighs against a finding of RLA jurisdiction. See, e.g., *Signature Flight Support*, 32 NMB 214, 224–225 (2005) (carrier did not exercise control over the manner in which an employer did business where the employer, not the carrier, was responsible for determining how its employees provided services to the carrier).

The second factor concerns the carriers' access to a company's operations and records. As the judge found, the carriers are contractually authorized to access the Respondent's books and records and to audit its performance of its obligations, and the record shows that several of the carriers exercise these contractual rights. This factor, therefore, weighs in favor of a finding of RLA jurisdiction. See *ABM Onsite Services*, supra, 45 NMB at 35 (carrier consortium's contractual "right to review all records related to the services provided by" the employer weighs in favor of a finding of carrier control).

Under the third factor, the NMB considers the carrier's role in personnel decisions. As the judge correctly

found, with the exception of two isolated incidents,⁹ the carriers play no role in the Respondent's personnel decisions. The Respondent conducts its own investigations into allegations of employee misconduct and makes disciplinary decisions based on those investigations. Because the Respondent independently determines how to manage its work force and the appropriate response to carrier feedback regarding employees' performance, this factor weighs against a finding of RLA jurisdiction. See, e.g., *Signature Flight Support*, 32 NMB at 225–226 (carrier did not control an employer's personnel decisions where it was not involved in hiring, investigating allegations of misconduct, or disciplining or discharging employees).

The fourth factor is the degree of carrier supervision. The judge correctly found that the Respondent's on-site managers and supervisors are solely responsible for supervising the Respondent's employees. The carriers are not authorized to determine staffing levels, assign employees work, direct employees in the performance of their work, or authorize overtime. The credited testimony shows that the carriers' supervisors do not communicate directly with the Respondent's employees regarding their work performance. Accordingly, this factor weighs against a finding of RLA jurisdiction. See *Signature Flight Support*, 32 NMB at 225–226 (no carrier control where carrier did not directly supervise the employer's employees or determine how to manage employees' performance); *Air BP, A Division of BP Oil*, 19 NMB 90, 92 (1991) (no carrier control where the employer had "sole authority over its employees and the carriers ha[d] no direct supervisory authority over [the employer's] employees").

The fifth factor addresses carrier control over employee training. The Respondent is solely responsible for training employees on safety matters. The judge correctly found that the Respondent maintains a detailed safety and training manual and conducts extensive employee training. Although the carriers provide supplementary training and sometimes require that their employees train the Respondent's trainers, the majority of that training is federally mandated. See, e.g., *Ogden Aviation Services*, 23 NMB 98, 103, 106–107 (1996) (no carrier control where employees received "general on-the-job training" from the employer and, from carriers, a limited amount of training "necessary to satisfy security and safety requirements"). Because the Respondent is principally responsible for training its employees and the carriers

⁸ To the extent the judge relied on Board and NMB decisions that are no longer precedential because they did not correctly apply the six-factor test, we do not rely on those decisions.

⁹ As noted above at fn. 7, the record shows that a carrier once recommended that the Respondent promote an employee and once recommended the hiring of an employee.

play a limited role in employee training, this factor weighs against a finding of RLA jurisdiction.

Finally, under the sixth factor the NMB evaluates whether employees are held out to the public as carrier employees. As the judge correctly found, the record shows that about 90 percent of the Respondent's employees wear the Respondent's uniforms and badges. This factor, therefore, weighs against a finding of RLA jurisdiction. See *Signature Flight Support*, 32 NMB at 219, 225; *Ogden Aviation Services*, supra, 23 NMB at 107.

In sum, one factor weighs in favor of a finding of carrier control and RLA jurisdiction, and the other five factors weigh against such a finding. With respect to the one factor weighing in favor of carrier control, we note that the NMB has historically found that carriers' access to a contractor's records is typical in subcontractor relationships and, as such, is insufficient to confer RLA jurisdiction. See, e.g., *Air BP*, 19 NMB at 91-93 (contractual requirement of "around the clock" service and right to inspect the operations to ensure compliance with carriers' standards, training and recordkeeping requirements insufficient to confer RLA jurisdiction). Accordingly, this factor does not outweigh the other five factors.¹⁰

Having found that the one factor weighing in favor of RLA jurisdiction does not outweigh the other factors that do not favor RLA jurisdiction, we find that the Respondent is not directly or indirectly controlled by a carrier. Accordingly, the Respondent is an employer within the meaning of Section 2(2) of the Act and subject to the Board's jurisdiction. Further, because the Respondent filed only bare exceptions to the judge's finding on the merits of the unfair labor practice allegation, and we have found it appropriate to disregard those exceptions,¹¹ we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging and

refusing to rehire employee Joanne Alexandre because she engaged in union activity.

ORDER

The National Labor Relations Board orders that the Respondent, American Sales and Management Organization, LLC d/b/a Eulen America, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to rehire, or otherwise discriminating against employees because they engage in activities on behalf of Service Employees International Union, Local 32BJ or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joanne Alexandre full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Joanne Alexandre whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Joanne Alexandre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Joanne Alexandre, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix," in English, Haitian

¹⁰ We further note that in *Allied Aviation Service Co. of New Jersey v. NLRB*, the D.C. Circuit cited with approval the Board's comparison of the facts in that case with the facts on which NMB Member Geale relied when dissenting from decisions placing enhanced emphasis on carrier control over personnel decisions. 854 F.3d at 63, enforcing 362 NLRB 1392, 1393 (2015) (citing *Airway Cleaners, LLC*, 41 NMB 262, 273-280 (2014), and *Menzies Aviation, Inc.*, 42 NMB 1, 7-9 (2014)). Here, the record does not include evidence similar to that on which Member Geale relied in his dissents. Specifically, in both *Airway Cleaners* and *Menzies Aviation*, the contractors serviced only one carrier, and Member Geale noted the extent of the carrier's broad oversight and continuous monitoring of the contractor's operations. Member Geale also noted the carrier's role in hiring, disciplining, training, and determining the working conditions of the contractor's employees. Here, as discussed above, the Respondent services multiple carriers, none of them engages in any such oversight or monitoring of operations, and none of them exerts similar control over the Respondent's employees.

¹¹ See fn. 4, above.

AMERICAN SALES AND MANAGEMENT ORGANIZATION, LLC D/B/A EULEN AMERICA

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Creole, and Spanish.¹² Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 4, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring.

For the reasons explained in my dissenting opinion in *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, slip op. at 3-5 (2018), I believe that the National Mediation Board has not adequately explained its decision to return to the six-factor jurisdictional test that my colleagues apply here, having failed in particular to respond to the arguments made by dissenting Member Puchala in favor of adhering to the NMB's approach giving greater weight to carriers' control over personnel decisions. Neverthe-

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

less, I join in my colleagues' decision to assert jurisdiction, as the evidence demonstrates that the Respondent is not subject to carrier control under either NMB standard.

Dated, Washington, D.C. December 4, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, refuse to rehire, or otherwise discriminate against you because you have engaged in activities in support of Service Employees International Union, Local 32BJ or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Joanne Alexandre full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Joanne Alexandre whole for any loss of earnings and other benefits resulting from her discharge, less any interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Joanne Alexandre for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the

amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Joanne Alexandre, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

AMERICAN SALES & MANAGEMENT
ORGANIZATION, LLC d/b/a EULEN AMERICA

The Board's decision can be found at <https://www.nlr.gov/case/12-CA-163435> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Caroline Leonard, Esq., for the General Counsel.
Brian Koji, Esq. (Allen Norton & Blue) and *Jason S. Miller, Esq.*, for the Respondent.
Jessica Drangel Ochs, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on a consolidated complaint and notice of hearing (the complaint) issued on August 31, 2017, arising from unfair labor practice charges that Service Employees International Union, Local 32BJ (the Union) filed against American Sales and Management Organization, LLC d/b/a Eulen America (the Respondent or Eulen). The allegations all relate to the Respondent's operations at Fort Lauderdale-Hollywood International Airport (FLL or the airport),¹ where the Respondent performs a variety of services for a number of airline carriers.

Pursuant to notice, I conducted a trial in Miami, Florida, on November 13–16, 2017, at which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

¹ At trial, counsel for the General Counsel (the General Counsel) orally withdrew the allegations in the complaint pertaining to the Respondent's operations at Miami International Airport.

Issues

(1) Does the National Labor Relations Board (the Board) have jurisdiction over Eulen or, as the Respondent contends, is the nature of the airline carriers' control over Eulen such that it comes under the jurisdiction of the Railway Labor Act (RLA)?

(2) Did the Respondent violate Section 8(a)(3) and (1) by discharging Joanne Alexandre on April 28, 2016,² and then refusing to rehire her, because she engaged in union activity; or were its actions justified because she failed to timely renew her airport-required security badge prior to its April 20 expiration?

For reasons to be stated, I conclude that the Board has jurisdiction and that the Respondent's discharge of Alexandre and its refusal to rehire her violated the Act.

Witnesses and Credibility

Witnesses testifying on the jurisdiction issue were:

For the General Counsel: Gayle Defrancesco, general manager for American Airlines (AA) at FLL; and William Rose, ramp and operations manager for Spirit Airlines (Spirit) at FLL.

For the Respondent: Yasmin Kendrick, Eulen's Regional Director at FLL; and John Foster, Eulen's national director of corporate safety and compliance.

Witnesses testifying on Alexandre's discharge were:

For the General Counsel: Alexandre; Harris Harrigan, the lead organizer for the Union; and Kendrick as an adverse witness under Section 611(c).

For the Union: Catherine Duarte, a research analyst for the Union.

For the Respondent: Wilner Baptiste, Alexandre's supervisor; and Frank Capello, enterprise director of security for Broward County Aviation Department (BCAD), which operates FLL.

The Respondent did not call Jodi-Ann Pagon, who was Kendrick's administrative assistant and acted at Kendrick's direction; or operations managers and admitted supervisors John Marrast and Aurea (Audie) Mendez, regarding Alexandre's badge renewal. Marrast voluntarily left Eulen's employment, and Mendez also is no longer an employee. The record does not disclose whether the Respondent still employs Pagon.

An administrative law judge normally has the discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be expected to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt*

² All dates hereinafter occurred in 2016 unless otherwise indicated expressly or by context.

Memorial Medical Center, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enf. mem. 861 F.2d 720 (6th Cir. 1988).

Here, the Respondent offered no explanation of why Pagon, Marrast, or Mendez could not be available as witnesses or show that it sought to secure their presence, by subpoena if necessary. Accordingly, the Respondent's failure to call them leads to an adverse inference that their testimony would not have been favorable to the Respondent, and I credit the un rebutted accounts of witnesses who testified about incidents in which those individuals participated.

Capello of BCAD, Defrancesco of AA, and Rose of Spirit, as neutral third-party witnesses with no stakes in the proceeding, had no reason to testify untruthfully. In this regard, all of them answered questions without hesitation on both direct and cross-examination, and none of them demonstrated any suggestion that they were trying to skew their testimony either for or against Eulen. I therefore credit their testimony.

With regard to the jurisdiction facet of the case, witnesses agreed for the most part on underlying facts. Nor, with respect to Alexandre's discharge, was there much divergence in testimony about BCAD's badge renewal process.

Credibility resolution does come into play in terms of who was responsible for Alexandre's failure to timely renew her badge and the Respondent's motivation for refusing to allow her to file a new application and then rehire her.

Particularly as to Kendrick, I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. *Id.* at 798-799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

Kendrick's testimony about Eulen's relationship with its carrier customers presented an interesting dichotomy. On the one hand, when Kendrick was asked questions on direct examination that called for conclusions, she gave what seemed to be "canned" answers that did not deviate from the Company's claim that airlines control Eulen's operations. On the other hand, she generally answered specific questions in a straightforward manner that did not appear slanted in favor of the Respondent's position, and her answers were consistent with the testimony of Defrancesco and Rose. For example, on direct examination, when she was asked how often airlines contact

Eulen over Eulen employee issues, whether discipline, complaints or performance, she replied, "seldom" and could recall only one airline that had done so.³ And, on cross-examination by the Union about airline staff contact with Eulen employees, she volunteered that "our employees do not have communications with the clients; it's understood."⁴

Turning to Alexandre's permanent discharge, I find that Kendrick was not a believable witness as to the circumstances surrounding why management did not notify Alexandre prior to April 20 that Eulen had received her badge-renewal approval from BCAD, or why Kendrick decided that Alexandre was ineligible for rehire. I base this on (1) Alexandre's credited testimony concerning her efforts to get the approval notice from Eulen, (2) Supervisor Baptiste's un rebutted testimony about his conversation with Manager Marrast on about April 27 and what he told Alexandre that same day concerning the approval notice, (3) Baptiste's un rebutted testimony that if the Eulen office cannot reach an employee to tell him or her that the approval paper is ready, they send him an email or tell him to find and inform the employee, (4) the Respondent's submission of new applications for other employees whose BCAD badges expired (required by BCAD if a badge is not timely renewed), and (5) the ease with which the Respondent could have filed a new application for Alexandre. I will further address these points in the Facts and Analysis and Conclusions sections.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the thoughtful posttrial briefs that the General Counsel, the Union, and the Respondent filed, I find the following.

At all times material, the Respondent has been a Florida limited-liability company headquartered in Miami, Florida, engaged in providing aviation support services for various air carriers at airports, including FLL, in seven states. It is not owned by any of its client carriers. The Respondent has admitted the interstate commerce facts necessary to establish Board jurisdiction assuming that it does not fall under RLA jurisdiction, and I so find.

I. JURISDICTION

Eulen's website advertises to the public that it "provides a full-range of ground handling and passenger support services for domestic and international carriers" throughout the United States (see Jt. Exh. 20 at 1). Pursuant to various contracts with client airline carriers (see Joint Exhibits 6-17, 25-27), Eulen employees perform the following services at FLL:

- (1) AA – checkpoint and janitorial on Terminal (T) 3.
- (2) Bahamasair (Bahamas) – bag room, cabin services (cleaning of planes), janitorial, and ramp, T3 at relevant times.
- (3) Delta Airlines (Delta) – cabin services, T2.
- (4) Jet Blue Airlines (JetBlue) – checkpoint, T3.
- (5) Spirit – cabin services, T4.

³ Tr. 522.

⁴ Tr. 577.

- (6) WestJet Airlines (West Jet) – bag room, cabin services, counter, janitorial, and ramp. T1.

Neither the General Counsel nor the Union dispute that all of the above work has been traditionally performed by airline carriers themselves.⁵ At the airport, Eulen employs 172 rank-and-file employees and 19 supervisors (see Jt. Exh. 2, Para. 15 and 17, as amended by oral stipulation). Regional Director Yasmin Kendrick, who came to FLL in February, is the highest-ranked Eulen official at the airport. She is assisted by an administrative assistant. Below her in the organizational structure are operations managers and supervisors who are assigned to specific airlines. The number of employees assigned to each carrier is:

- (1) AA – approximately 10 or 12.
- (2) Bahamas – approximately 20.
- (3) Delta – approximately 40.
- (4) JetBlue – approximately 10 or 12.
- (5) Spirit – between 50 and 60.
- (6) WestJet – between 25 and 30.

Eulen's administrative office is located on T2 in Delta's cabin-cleaning section (the Delta office), in space that Delta provides. The Eulen office has its own separate entrance that Delta's employees do not use. WestJet also provides Eulen space (the WestJet office). In addition, Eulen leases space on T4 (the Spirit office). Each office has a time clock that employees use to clock in and out.

The Role of Airlines in the Respondent's Operations

Hiring and Supervision

The parties stipulated that the Respondent directly hires its employees, including those at FLL; employees are paid and otherwise compensated solely by the Eulen; airlines do not review, consider or approve employees' time off requests; and Eulen's supervisors generate their work schedules (see Jt. Exh. 2).

The Respondent provides new hires with a new hire packet (Jt. Exh. 18 is an exemplar). It includes provisions stating that employees are compensated by Eulen and paid through Eulen's contractor, ADP; airlines do not compensate them or provide them any benefits; airlines have no role with regard to their time off requests; and Eulen's supervisors generate and publish their work schedules.

The Respondent has its own employee handbook (Jt. Exhs. 3–5, covering different relevant time periods) that sets out many terms and conditions of employment, including appraisals by supervisors, paid time off and other leave policies, grooming and appearance standards, rules of conduct and discipline, and attendance policy.

Contracts in the record from four of the six carriers contain provisions explicitly stating in one way or another that Eulen is solely responsible for the assignment, supervision and direction of its employees and how they perform their work. See Jt. Exh. 6 at 19, (AA); Jt. Exh. 10 at 3, 4; Jt. Exh. 11 at 2 (Delta); Jt. Exh. 13 at 12 (JetBlue); and Jt. Exh. 15 at 3, 5 (Spirit). The Delta contract specifically states that Eulen is an independent

contractor and that Delta has no employer role over Eulen's employees. The WestJet contract and the standard ground handling agreement that governs the services that Eulen provides to Bahamas (Jt. Exh. 9) do not specifically address those matters.

Both Gayle Defrancesco of AA and William Rose of Spirit testified unequivocally that their respective airlines do not dictate staffing levels and that their supervisors have no supervisory role over Eulen's employees, including assignments, direction, authorization of overtime, or discipline. Neither has ever requested that a Eulen employee be transferred from serving their airline. Defrancesco did complain about janitorial employee Hermogenes Vasquez Ramos (Vasquez) but simply asked Operations Manager Michael Oviedo to speak with him (R. Exh. 2 at 2). At FLL, AA has never exercised its reserved contractual right (Jt. Exh. 6 at 19) to interview and approve Eulen's station management and other employees. Rose complained on one occasion about a Eulen dispatcher, whom Kendrick transferred from Spirit, but he made no recommendation for discipline (see R. Exh. 3 at 2).

Kendrick's testimony substantially comported with theirs. Thus, Eulen's policy is that its employees do not have communications directly with airlines' personnel, and airlines seldom contact her over Eulen employees.

On some occasions, an airline has complained about the performance of a Eulen employee and/or requested that Eulen remove a particular employee from servicing it as a customer. In such cases, Kendrick has conducted her own investigation before taking any action. She did not cite any instances when a carrier has recommended any disciplinary action be taken against an employee.

Respondent's Exhibit 3 reflects a number of carrier complaints. As a result, Kendrick terminated one employee for tardiness, and two supervisors and an employee as a result of a WestJet investigation that concluded they had been stealing; offered to transfer two employees to jobs with other carriers (both voluntarily resigned); and issued an oral warning to one employee (there is no indication of whether he was transferred).

In at least two situations, Kendrick issued lesser discipline following a carrier complaint, and the employee was transferred to work for another airline. In the first, Bahamas complained about the rude behavior of counter agent Vasquez (mentioned above), as a result of which Oviedo issued him a written warning, and he was transferred to AA (GC Exh. 8). Oviedo, wrote in the discipline that although the offense was grounds for termination, "[W]e believe on[sic] giving our employees a second opportunity," and Kendrick testified that this sentiment was communicated to Vasquez in the meeting that she and Oviedo conducted with him. The following month, AA complained about Vasquez' inappropriate behavior as a janitor, resulting in Kendrick suspending him until further investigation (R. Exh. 2). Ultimately, he was not terminated. In the second (see R. Exh. 11), Bahamas complained about the conduct of a bag room employee, who received a written warning and was transferred to WestJet cabin cleaning.

Kendrick could recall only one instance when a carrier has made a recommendation for a promotion; when an assistant manager at Bahamas recommended that ramp lead Brian Bolt be promoted to a supervisor when the position opened up at

⁵ GC's opening statement at Tr. 27; Union Br. at 21.

Bahamas (see R. Exh. 8). As to hiring, Kendrick could recall only one time that a carrier has recommended that Eulen hire someone; when Ginella Alvarez of Delta management recommended the hiring of John Vixamar, a Delta employee. Kendrick made the decision to accept both recommendations.

As far as regular audits of Eulen's employees performing cabin cleaning, Spirit tries to have supervisors audit turnaround flights (turns) weekly and overnight aircrafts ("remain over nights" or RONS) once or twice a week, using set check-list criteria established by Spirit's cabin-cleaning department.⁶ Individual employees are not evaluated, and Rose was unaware if such audits have any impact on Spirit's payment to Eulen. Delta performs audits on cabin cleaning on RONS at least three times a week and submits copies of the audit reports to Kendrick, who calls a meeting of her supervisors if she sees any area that needs to be discussed. AA does not conduct regular audits or evaluations of Eulen's work as it has the right to do under their contract. WestJet has a traveling auditing team that has not yet come to FLL.

On a more informal basis, Kendrick receives about one call a month in which an airline supervisor discusses his or her observations of Eulen employees' performance.

Training

The contracts that Eulen has with carriers provide that Eulen is responsible for ensuring that its employees receive proper training as required by the particular carrier. See Jt. Exh. 6 at 19, Jt. Exh. 7 at 4 (AA); Jt. Exh. 10 at 3, Jt. Exh. 11 at 2, 4 (Delta); Jt. Exh. 13 at 12 (JetBlue); Jt. Exh. 15 at 6 (Spirit); and Jt. Exh. 17 at 14 (WestJet).

Eulen has its own safety and training manual of over 900 pages that covers training not mandated by its carrier-clients (Jt. Exh. 28 is the table of contents and chapter 1). Safety matters are handled solely by Eulen and not the carriers (*ibid* at 34, 35). When Eulen's safety and training manual provided more stringent standards for ramp agents than Delta's training required, Eulen requested and received from Delta permission to impose them.

Delta establishes the training path for cabin cleaning and requires Eulen to have a Delta-trained and qualified trainer to conduct some of the training (see R. Exh. 5). Both John Foster, Eulen's national director of corporate safety and compliance, and Kendrick have attended such trainer training (see R. Exh. 6). Some Delta training is computer-based (CBT), using Delta's computers in Delta's space at FLL. Other carriers also require Eulen representatives to undergo carrier training to qualify them as trainers of other Eulen employees.

Of the training that Delta requires, including annual qualification training, probably 60 percent is mandated by various Federal agencies, as opposed to the Delta's own requirements.⁷ The agencies include the Environmental Protection Agency, Federal Aviation Authority, Occupational Safety and Health Agency, Transportation Safety Agency (TSA), and U.S. Cus-

toms and Border Protection.

AA does not require any training for the jobs that Eulen employees perform. Spirit provides a module for Eulen for a CBT program that Eulen has a trainer schedule and conduct yearly in its own location using Spirit computers. The training sets out Spirit's cabin-cleaning specifications for turns and RONS.

Bahamas did not have a ramp training program when Eulen got the contract to perform that work. Foster jointly put together such with a representative of Bahamas, using the Eulen ramp-training program as a basis. This is the practice when a client does not have its own established training.

Other Factors

All Eulen employees at FLL wear Eulen uniforms and name tags (see GC Exh. 16), with the exception of WestJet passenger services or counter agents (14, including 2 leads), who wear WestJet uniforms and name tags (see R. Exh. 7). WestJet has no other counter agents.

The only airline at FLL that provides equipment to Eulen is Delta. This includes a lavatory truck, a garbage truck, and a tug to which the garbage truck can be hooked. All of the airlines for which Eulen does cabin cleaning furnish the cleaning implements such as brushes. Some also provide the cleaning solutions; for others, the responsibility is Eulen's.

Several of the contracts, AA (Jt. Exh. 7 at 4), Delta (Jt. Exh. 10 at 10), JetBlue (Jt. Exh. 13 at 5), and Spirit (Jt. Exh. 15 at 7) expressly state, with some variations in wording, that the carrier has the right to audit Eulen's books and records pertaining to the services that Eulen provides to them. The Delta contract (*ibid*) also includes records relating to Eulen's provision of services to other air carriers at the applicable airports. None of these contractual provisions make an exception for personnel or employment matters.

II. ALEXANDRE'S PERMANENT DISCHARGE

BCAD-issued Badges

All Eulen employees are required to have BCAD-issued identification badges needed to "swipe" in for access to secured areas of FLL (security identification display areas or SIDAs). Each of the over 1,000 companies doing business at FLL has a designated point of contact or signatory with BCAD, which maintains an office in the security department at the airport.

The procedure for any company employee to receive an initial badge is as follows. The employer fills out and approves an application, which the employee takes to the BCAD office, where he or she is fingerprinted for purposes of a background investigation. Such investigation takes from under 3 to over 5 days, depending on the applicant's place of birth and any criminal record. Once BCAD receives notification that the employee has passed the background investigation, BCAD sends an approval notice (media application approval notice) to the employer's signatory that the applicant is cleared and can come back to BCAD to take sensitive security training, including proper use of the badge. After the employee passes the training, BCAD photographs the employees and issues the badge.

The initial badge is good for 6 months, expiring at midnight on the day of expiration; the first renewal is good for 1 year; and renewal periods thereafter are 2 years following expiration

⁶ For turnaround flights, the average time on board spent cleaning is 5 minutes; for RONS, the cleaning is more in-depth, averaging between 50 and 60 minutes.

⁷ Foster at Tr. 422.

on the employee's birthday. The processing time for a renewal is virtually the same as for the initial badge. If a badge expires, it is deactivated, and the employee loses access to SIDAs and normally must reapply as a new applicant. There is no difference in processing time between a new application and a post-expiration application.

Alexandre's Employment

Joanne Alexandre worked for Eulen at FLL from October 2014 until her termination on April 20. At all times, she was a cabin service agent for Spirit RONS on the 10:30 p.m. to 6:30 a.m. shift, supervised by Jean Baptiste. The sole reason that the Respondent has advanced for discharging Alexandre is her failure to timely renew her badge.

General Counsel's Exhibit 15 is Alexandre's initial badge application, which she and Eulen Signatory Jorge Santana signed on October 1, 2014, and she took to the BCAD office that day. Operations Manager Aurea (Audie) Mendez later called her on her personal cell phone and let her know that the approval paper was ready. They met in the lobby, where Mendez gave it to her. Alexandre went to the badge office, took and passed the security training, and received her badge, all on the same day.

The badge was valid until April 20, 2015. In 2015, Alexandre followed the same procedure in renewing her badge, which was good until April 20.

On April 5, Alexandre went to the Delta office, where she and Administrative Assistant Jodi-Ann Pagon signed Alexandre's application for a second renewal (Jt. Exh. 22). Alexandre took it to the BCAD badge office that day, where she was fingerprinted. She testified that BCAD told her they would send the approval notice to Eulen, either in a week or two (Tr. 169) or 8 days (Tr. 175); thereafter, she could come back for the security training test and get her badge.⁸ On April 11, BCAD emailed Alexandre's approval notice to Eulen (Jt. Exh. 23).

After April 5, Alexandre continued to go to work. For the following reasons, I credit Alexandre's account of her conversations with Baptiste on the subject of the renewal over his.

Firstly, Alexandre's testimony was more plausible. Secondly, Baptiste's testimony was that he put the onus on Alexandre by repeatedly telling her to call the office and find out if it was ready. This is contradicted by his testimony that the normal practice is that Eulen notifies the employee of the approval, as well as his testimony that when management cannot reach employees to tell them that their approval papers are ready, they email or tell him orally to find the employees and so inform them (Kendrick testified similarly). Finally, Alexandre's testimony on direct and cross-examination was consistent.

⁸ The difference in time frame that Alexandre gave is immaterial. The Respondent's counsel objected that this was hearsay. However, as I stated at trial, the Board does not invoke a technical rule of exclusion but admits hearsay evidence and gives it "such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997), enf. denied on other grounds, 598 F.2d 1267 (2d Cir. 1979), citing *Alvin J. Bart & Co.*, 236 NLRB 242, 242 (1978). Here, this testimony was credible and substantially consistent with other record evidence, including the testimony of Kendrick and Frank Capello, BCAD's enterprise director of security.

I am cognizant of the fact that Alexandre did not mention those conversations in her affidavit (R. Exh. 4). However, the affidavit is silent on whether or not any such conversations occurred, and Baptiste also testified that they had conversations on the subject. Accordingly, I decline to find that such omission in her affidavit bears negatively on her credibility.

Accordingly, I find the following. Alexandre asked Baptiste at work a number of times starting on about April 15 whether her paperwork was ready at the Eulen office, to which he replied that they had not heard anything. She received no phone calls on her cell phone (her only personal phone) or emails from Eulen about the approval. On April 19, when Alexandre called, Baptiste told her not to report to work that evening because her badge expired at midnight.

Kendrick testified that the normal procedure is that when the BCAD sends Eulen the media application approval notice for an employee's badge, the administrative assistant attempts to reach the employee by phone and also puts in a clipboard posted by the time clock used by the employee. However, she conceded that she had no personal knowledge that this practice was followed with respect to Alexandre's renewal.

In this regard, although Kendrick testified that Pagon attempted to reach Alexandre by telephone, Pagon was not called to testify, and she did not keep a log or other record of any such calls. Kendrick further testified that the normal procedure would have been for Pagon to tell Baptiste that Alexandre's approval notification was put in the clipboard posted by the time clock in the Spirit office. However, Baptiste testified about no such conversations with Pagon and that he first learned about the approval from Operations Manager John Marrast on April 27. As noted above, Baptiste further testified that when management cannot reach employees to tell them that their approval papers are ready, they ask him to find the employees and so inform them. In this case, he received no such communication.

I credit Alexandre's un rebutted testimony that after April 19, she continually called Baptiste and asked if the approval paper had arrived. On the evening of April 27, Marrast told Baptiste to inform Alexandre that the approval paper was ready for her to renew her badge. Baptiste almost immediately afterward called Alexandre and told her.

On the morning of April 28, Alexandre went to FLL and called the Delta office from the lobby. Mendez brought her the paper but said nothing. Alexandre took the badge to the BCAD office, where she was told that he could not take the test with that document because her prior badge had already expired, and that she would have to get a new application from the Eulen office. Her badge was confiscated. Alexandre returned to the lobby and called Mendez. After about 2-1/2 hours, Mendez arrived and told Alexandre that she could not do anything for her because the badge had expired and Alexandre was therefore no longer employed. Alexandre asked if she could be rehired if she filled out a new employment application. Mendez replied no, because there was no vacancy. Mendez asked if Alexandre had changed her phone number because they had called her many times, and she never returned the calls. Alexandre responded that she had never before missed their calls.

Alexandre's termination notice (Jt. Exh. 21) was dated April

29 and signed by Kendrick and Pagon. It stated: “Ms. Joanne Alexandre[sic] badge was confiscated by BCAD as it was expired for 8 days already although we made all possible attempts to communicate to Ms. Alexandre to come in to take the class prior to the expiration of the ID.” It also checked off that she was not eligible for rehire.

Kendrick testimony as to the exact reason Alexandre was permanently discharged was markedly equivocal and convoluted.⁹ She testified that after receiving notice that BCAD confiscated Alexandre’s badge, she had to terminate Alexandre because Alexandre could not continue to work. At another point, she explained that Alexandre went to BCAD after the badge expired and they confiscated it, instead of her having reached out to Eulen to help her after she missed the deadline, thereby suggesting that constituted misconduct on Alexandre’s part. However, Kendrick also testified that it is “no problem for us to try to help somebody” who has missed the deadline.¹⁰ Furthermore, when Kendrick was asked if employees are eligible to be rehired if their badge expires and they therefore have to be terminated, she answered yes but then gave an ambiguous explanation. In sum, she did not offer a cogent rationale for why she deemed Alexandre ineligible for reemployment. I will later address the treatment of other employees whose badges expired.

Alexandre’s Union Activity

For several years, the Union has engaged in organizing efforts aimed at Eulen and a couple of other contractors at FLL. In November 2015 and March, the Union engaged in an “escalation” of those efforts by publicizing its presence and calling a 1-day strike. During these escalations, Harris Harrigan and other organizers, who sometimes wore purple and yellow shirts with the union logo (GC Exh. 17), spent most of each day on the ground arrivals level of all four terminals and conversed with employees who were swiping their badges for entry to SIDs.

On November 18, 2015, the Union sent to Eulen’s Chief Executive Officer Llaverio Hervas and Chief Operations Officer Livan Acosta notice of a 1-day strike at FLL, to begin that afternoon, to protest the Company’s prohibitively expensive health plan and lack of respect for employees’ organizing rights (GC Exh. 10). The following day, the Union sent them an unconditional offer to return to work on behalf of all striking Eulen employees who had gone on strike (GC Exh. 11).

On March 30, The Union sent a similar strike notice to Hervas and Acosta, stating that a 1-day strike would start at 5 p.m. that day, to protest several cited working conditions (GC Exh. 12). A similar unconditional offer to return to work was sent to them the following day (GC Exh. 13).¹¹

In 2015, approximately 34 or 35 Eulen employees participated in the strike out of approximately 100 who were scheduled;

in 2016, about 70 out of the same scheduled number did so. Alexandre participated in both strikes. She appears in three photographs taken at the 2015 strike that were uploaded on the Union’s website in March (CP Exhs. 4–7). In two of them, she is clearly visible wearing a shirt with union insignia.

In the 2016 strike, she wore either a Eulen or a union shirt (GC Exh. 17) and was in a group of Eulen employees who carried signs and went back and forth between T1 and T2. Everyone in her crew participated in the strike. She observed that Eulen supervisors saw them as the supervisors went to their cars after their shifts concluded.

When Alexandre returned to work after the 2016 strike, Baptiste spoke to her and others in her crew. He said that he was angry about having had to work alone to clean all the planes. In her testimony, Alexandre candidly added that he was not angry at them for their participation in the strike. Harrigan testified that Baptiste made very similar comments to him on the T4 arrivals level late in the evening of March 30, stating to the effect that it was an impressive strike and that he was going to have to work all night by himself, and that “it sucks.”¹²

Baptiste was not asked if he said the above to Alexandre and her coworkers or to Harrigan. When a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I therefore credit Alexandre’s and Harrigan’s uncontroverted testimony.

Treatment of Other Employees

The General Counsel offered a series of documents (GC Exhs. 2–7) concerning employees whose termination forms referenced the badge requirement.¹³ By order of exhibit number they are:

- (1) Fordline Jean Baptiste, March 2, 2017 – voluntarily terminated; voluntarily did not renew her badge. Kendrick testified that Baptiste was not renewing her badge because she was thinking of relocating out of the area. The form marked her eligible for rehire.
- (2) Charilus Nodieu, October 20 – involuntarily terminated; took the SIDA class three times and did not pass. Kendrick testified that he would have had to go through the whole process of getting a new badge. Eligible for rehire.
- (3) Wheeler Deland, June 7 – involuntarily terminated because TSA did not approve his application for a renewal badge. Ineligible for rehire.
- (4) Tevin Charles, February 28, 2017 – voluntarily terminated; did not renew his badge. This followed a meeting that Kendrick and Marrast held with him on February 27, at which Charles was presented with a disciplinary action form terminating him for “unsatisfactory

⁹ See Tr. 47–48.

¹⁰ Tr. 47.

¹¹ The Union faxed and emailed GC Exhs. 10–13. The Respondent questioned whether Hervas and Acosta received the faxes but stipulated that the Respondent did receive the emails. Accordingly, the receipt of all four documents is admitted regardless of whether or not the Respondent’s officials also received them by fax.

¹² Tr. 148.

¹³ Some of these documents are duplicated in R. Exh. 1.

performance.” Marrast wrote thereon, “Mr. Charles left his ID after this warning” which was to expire on March 1, and Kendrick testified that when Charles left his badge, he stated that he was not coming back. On about February 27, Charles had also received a final written warning for absenteeism/tardiness. Eligible for rehire.

- (5) Jean Villain, February 28, 2017 – voluntarily separated; did not renew his badge. On March 8, Administrative Assistant Edith Carbonara (who had replaced Mendez in that position) approved a new badge application for him to take to BCAD, which approved his application, and he filled out a new hire payroll sheet on March 27. Eligible for rehire.

In addition, the Respondent submitted documents (R. Exh. 1) showing the following:

- (1) Sylvania Jeanty – voluntary terminated on October 1, 2015, for allowing her badge to expire and never returning to work. Ineligible for rehire.
- (2) Pichardo Natalia – involuntarily terminated on March 1, 2015, for refusing to meet with Broward County regarding her missing/found badge by a BCAD employee. Ineligible for rehire.
- (3) Leonard Cadet – involuntarily terminated on July 6, 2017, because his badge expired and he could not renew his badge because he lost his document. Ineligible for rehire.
- (4) Marie Carol Jean Paul – voluntarily terminated on July 6, 2017 because she lost her work permit and was unable to renew her badge before it expired. Eligible for rehire.

Analysis and Conclusions

1. JURISDICTION

Section 2(2) of the Act defines “employer” to exclude any person subject to the Railway Labor Act (RLA). The RLA, as amended, applies to rail carriers, common air carriers, and “any company which is directly or indirectly owned or controlled by or under common control with any carrier.” 45 U.S.C. § 151 First, 181. Carriers hold no ownership interest in the Respondent, which contends that carrier control brings it under the jurisdiction of the RLA. The Respondent bears the burden of proof of showing that it is exempt from the Act and that its employees do not enjoy the Act’s protections. See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 722 (2001); see also *Holly Farms Corp. v. NLRB*, 517 NLRB 392, 399 (1996).

The National Mediation Board (NMB) administers the RLA, and the Board generally refers a claim of RLA jurisdiction to the NMB for an advisory opinion; however, there is no statutory requirement that it do so before determining whether to assert jurisdiction. *Spartan Aviation Industries, Inc.*, 337 NLRB 708, 708 (2002), citing *System One Corp.*, 322 NLRB 732, 732 (1996); see also *Allied Aviation Service Co. of New Jersey v. NLRB*, 854 F.3d 55, 62 (D.C. Cir. 2017). When the Board declines to refer an RLA jurisdictional issue to the NMB, it follows NMB precedent in deciding the matter. *United Parcel*

Service, Inc., 318 NLRB 778, 781 (1995), enfd. 92 F.3d 1221, 1221–1226 (D.C. Cir. 1996).

The NMB employs a two-part “function and control” test to determine whether an employer that is not itself a carrier is sufficiently controlled by a carrier to be subject to RLA jurisdiction. See *Signature Flight Support of Nevada*, 30 NMB 392, 399 (2003). The conjunctive test asks: (1) “whether the nature of the work is that traditionally performed by employees of rail or air carriers,” and (2) “whether the employer is directly or indirectly controlled by, or under common control with a carrier or carriers.” *Ibid.* The Board utilizes this same standard. See *Spartan Aviation*, above at 708, citing *System One*, above at 732.

To determine whether an employer is under the control of a carrier, the NMB traditionally considers six factors:

- (1) The extent of the carrier’s control over the manner in which the company conducts its business.
- (2) Access to the company’s operations and records.
- (3) The carrier’s role in personnel decisions.
- (4) The degree of supervision exercised by the carrier.
- (5) The carrier’s control over training.
- (6) Whether the employees in question are held out to the public as carrier employees.

Bags, Inc., 40 NMB 165, 169 (2013), citing, *inter alia*, *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007), and *Dobbs International Services*, 34 NMB 97 (2007).

As earlier noted, neither the General Counsel nor the Union dispute that the Respondent meets the first qualification; rather, they argue that the Respondent does not also satisfy the carrier-control test necessary for RLA jurisdiction. I now turn to a consideration of the six factors.

Carrier Control Over Eulen and its Employees at FLL

Concerning control over the manner in which Eulen conducts business at FLL, the primary role of the carriers is notifying Eulen of flight schedules to ensure that Eulen provides sufficient staffing to perform the services for which it has contracted. The airlines play no part in specifying individual employees or when they will work. The Respondent’s contracts with carriers and the carriers’ daily schedules dictate how Eulen determines staffing levels and shift assignments. This does not in and of itself establish carrier control over labor relations or how Eulen carries out its contractual services. As the NMB held in *Bags*, above at 169, “Bags has a contractual relationship with [named carriers] to provide services, therefore, it is expected that Carriers will outline what services are necessary” See also *Aero Port Services, Inc.*, 40 NMB 139, 142 (2013).

Recent NMB decisions not finding RLA jurisdiction have “emphasized in particular the absence of [carrier] control over hiring, firing, and/or discipline.” *Allied Aviation Service Co. of New Jersey*, 362 NLRB 1392, 1392 (2015), petition for review denied 854 F.2d 55 (D.C. Cir. 2017), petition for certiorari denied, –S.Ct.–, 2017 WL 4224908 (mem.) (November 13, 2017), citing *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014),

and *Menzies Aviation, Inc.*, 42 NMB 1, 7 (2014).¹⁴ The control over personnel decisions must be “meaningful” and “not just the type of control found in any contract for services” to establish RLA jurisdiction. *Airway Cleaners* at 268, citing *Bags*, above at 170.

The Respondent directly hires its FLL employees, who are paid and otherwise compensated solely by the Eulen. Eulen alone approves employees’ overtime hours and time off requests, and Eulen’s supervisors generate their work schedules. No airline supervisors or employees have supervisory authority over Eulen’s employees or can direct their work. Rather, carriers must address any issues with Eulen employees with Eulen management, Kendrick in particular.

Carriers have asked that certain Eulen employees be removed from their operations, but there is no evidence that they have ever recommended any of them be disciplined or fired. When carriers complain about Eulen employees, Kendrick conducts her own investigations before taking any actions, a factor militating against finding carrier control in personnel decisions (see *Aero Port Services*, above at 143). Significantly, when Bahamas complained about counter agent Vazquez, he received a written warning and was transferred to AA in janitorial service. AA also complained about him, as a result of which he was suspended but ultimately not discharged. In another case, a bag room employee who was the subject of a complaint by Bahamas, received a written warning and was transferred to WestJet cabin cleaning but not discharged. Two other employees who were the subjects of carrier complaints were offered the opportunity to transfer to work for other carriers. Carrier ability to request removal of an employee is not tantamount to control over discipline within the meaning of the RLA, and an employer’s retention and exercise of the option to utilize a removed employee elsewhere militates against finding such control. See *Menzies Aviation*, above at 5.

At most, during Kendrick’s tenure as station manager since February, there was one occasion when a carrier recommended someone be hired and one occasion when a carrier recommended an employee be promoted to a supervisor position. This hardly amounts to meaningful carrier input on hiring or promotion. See *Airway Cleaners*, above at 268–269, citing *Air Serv Corp.*, 39 NMB 450, 457 (2012) (a carrier’s recommendation for hiring does not establish requisite control when the carrier has no involvement in the actual hiring process).

The Respondent (Br. 130) cites two NMB decisions, *Command Security Corp.*, 27 NMB 581 (2000), and *ServiceMaster Aviation Services*, 24 NMB 328 (1997), for the proposition that the carrier’s right under contract to exercise indicia of control is what is critical, not whether the carrier has exercised the right only occasionally or not at all. However, those cases are distinguishable on their facts. In the first, the NMB concluded that

the contracts in question gave the carriers “substantial control over the conduct and performance” of the contractor’s employees. In the second, the contract required, inter alia, that the carrier approve all overtime in advance; that the contractor’s supervisors be certified by the carrier; and that the contractor immediately remove any employee whom the airline deemed unqualified, create and submit its staffing plans to the carrier, and create a career enhancement program acceptable to the carrier.

In sum, the carriers here play no significant role in any personnel decisions or the supervision of Eulen’s employees, which authority is vested exclusively in Eulen management and supervisors. As the NMB has held, elements of control that are “no greater than that found in a typical subcontractor relationship” are insufficient to establish RLA jurisdiction. *Allied Aviation Co.*, above at slip op. 2, citing *Menzies Aviation*, above at 7; see also *Bags*, above at 169 ([T]he type of control exercised by the Carriers over Bags is found in almost any contract between a service provider and a customer.”).

In terms of training, the contracts provide that Eulen is responsible for ensuring that its employees receive proper training as required by the carrier. At least some of the client airlines train Eulen employees to be trainers for other Eulen employees; airline personnel do not conduct the training. This does not establish carrier control within the meaning of the RLA. See *Airway Cleaners*, above at 268; *Bags*, *ibid.* For CBT, the carrier may provide the training module and computers. However, most of the training that the carriers require is mandated by various Federal agencies and that training is therefore not imposed as a matter of discretion by the airlines. Such training does not constitute carrier control within the meaning of the RLA. *Aero Port Services*, above at 143.

Delta and WestJet provide Eulen office space, Delta provides a break room for Eulen’s employees, and Delta provides a few pieces of equipment for Eulen employees’ use. Standing alone, these factors are insufficient to establish material control by a carrier. See *Bags*, *ibid.*

Other Factors

The carriers do have access to audit Eulen’s operations and records. On the other hand, Eulen holds itself out to the public as an employer that provides highly-qualified employees to carriers, and over 90 percent of its employees at FLL wear Eulen uniforms and badges with Eulen identification.

Conclusion

Considering all of the above factors, I conclude that the Respondent has not met its burden of showing that the carriers exercise the degree of control over the Respondent at FLL that would remove the Respondent from Board jurisdiction under Section 2(2) of the Act. I note in particular the essentially non-existent role that the airlines play in Eulen’s hiring, disciplining, firing, directing, or supervising its employees.

II. ALEXANDRE’S DISCHARGE AND THE REFUSAL TO REHIRE HER

The framework for analyzing alleged violations of Section 8(a)(3) turning on employer motivation is *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *General Motors Corp.*, 347

¹⁴ In affirming the Board’s assertion of jurisdiction, the court distinguished its decision denying enforcement in *ABM Onsite Services-West, Inc.*, v. NLRB, 849 F.3d 1137 (DC 2017), cited by the Respondent (Br. at 143). Thus, in *ABM* the Board had departed from past practice by effectively treating control over personnel decisions as “necessary” rather than considering all of the traditional six factors, whereas the Board in *Allied* had not relied “on only a single factor” but had considered them all (854 F.3d at 63–64).

NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus (which may be inferred from all of the circumstances), and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), enf'd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The General Counsel's prima facie case:

Activity – Alexandre's openly participated in the Union's November 2015 and March "escalations" at FLL, at which the Union publicly solicited employee support and which culminated in two 1-day strikes.

Knowledge – Baptiste, Alexandre's supervisor, had actual knowledge that she engaged in the 2016 strike. It is well-established that a supervisor's knowledge of union activities is imputed to the employer absent a credible denial of such knowledge by management. *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006); *Dobbs International Services, Inc.*, 335 NLRB 972, 973 (2001); see also *Clark & Wilkins Industries, Inc.*, 290 NLRB 106, 106 (1988), enf'd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990). In this regard, the Respondent "could easily have produced its managers to testify" that Baptiste did not communicate his knowledge to them." See *State Plaza* at 756, citing *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). In light of this, I need not address the Union's assertions (Br. 35–36) that the Respondent's

knowledge of Alexandre's union activities should be inferred from her photographs posted on the Union's website, or otherwise determine whether knowledge should also be inferred from other circumstances.

Employer Action – The Respondent discharged Alexandre on April 28 and thereafter refused to re-hire her.

Animus – There is no direct evidence of union animus. However, a discriminatory motive may be inferred from circumstantial evidence and the record as whole. *Grant Prideco, L.P.*, 337 NLRB 99, 99 (2001), citing, inter alia, *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991) and *Davis Supermarkets, Inc.*, v. *NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); see also *In re Overnite Transp. Co.*, 335 NLRB 372, 375 (2001). Inferred animus can be based on such factors as (1) timing and disparate treatment. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011), citing *Grant Prideco*, *ibid*; *Guardian Automotive*, 340 NLRB 475, 475 fn. 1 (2003); (2) the employer's failure to follow its normal practices or procedures. *Grand Central Partnership*, 327 NLRB 966, 975 (1999); *Woodlands Health Center*, 325 NLRB 351, 362 (1998); and (3) the employer's advancement of a reason that is contrived or implausible. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978), enf'd. in part, enf. den. in part without opinion 622 F.2d 592 (7th Cir. 1980).

Based on the following circumstantial evidence, I conclude that the element of animus has been satisfied.¹⁵

(1) In terms of timing, Alexandre participated in the strike on March 30. She went to the Eulen office on April 5 and got her badge renewal application, which she took to the BCAD office that same day. Eulen received the approved application back from BCAD on April 11, yet not until April 27 (a week after the badge expired) did Manager Marrast tell Supervisor Baptiste to inform Alexandre that the application had been approved. Taking April 11 as the operative date for timing, this was less than 2 weeks after Alexandre engaged in union activity.

(2) The Respondent has treated differently other employees whose badges have lapsed, in terms of being willing to submit new badge applications on their behalves to BCAD and then rehiring them. The Respondent argues (Br. at 123–124 fn. 15) that comparing the treatment of other employees is of limited probative value because all of the surrounding circumstances are unknown. Nonetheless, the following clearly establishes that the Respondent has no set policy of barring employees whose badges have lapsed from being reemployed.

Thus, of nine other employees whose badges lapsed, five were deemed eligible for rehire, four were not. Of the ones marked ineligible for rehire, it appears that Jeanty stopped coming to work, Deland failed the background investigation, Natalia refused to meet with BCAD regarding her missing/found badge, and Cadet could not renew his badge because he lost an unspecified document. These five marked eligible for rehire

¹⁵ I find it unnecessary to consider whether Pagon's statement to Alexandre on April 28 that she could not apply for rehire because the Respondent had no vacancy amounted to a shifting defense that would also give rise to an inference of unlawful motive.

included Baptiste, who did not renew her badge because she was thinking of relocating; Nodieu, who failed the SIDA class three times and would have to go through the whole process of getting a new badge; Villain, who voluntarily separated and was later rehired after Eulen submitted a new badge application on his behalf, which BCAD approved; Paul, who lost her work permit and was unable to renew it before her badge expired; and Tevin Charles.

The Respondent's refusal to reemploy Alexandre was particularly suspect in light of the Respondent's willingness to rehire Charles despite the following circumstances. On February 27, after Kendrick and Marrast presented him with a termination paper for unsatisfactory performance, he left his unexpired badge and stated that he was not coming back—essentially walking out on them. Furthermore, on about the same date, he also received a final written warning for absenteeism/tardiness. Thus, despite serious issues with his performance and his voluntarily surrendering his badge, the Respondent still considered him eligible for rehire.

(3) The Respondent failed to follow its normal procedures in notifying Alexandre that the approval notice had come back from BCAD. It is undisputed that the administrative assistant lets an employee know by telephone when Eulen has received the document. Although Eulen received the approval notice on April 11, Baptiste did not notify Alexandre of such until April 27. That Baptiste had no trouble reaching Alexandre on her cell phone on the evening of April 27 raises doubts as to the validity of the Respondent's claim that Pagon could not reach her in that manner. Kendrick further testified that the normal procedure would have been for Pagon to tell Baptiste that Alexandre's approval notification was put in the clipboard posted by the time clock in the Spirit office. However, Baptiste testified about no such conversations with Pagon and that he first learned about the approval from Marrast on about April 27. Moreover, Baptiste further testified that when management cannot reach employees to tell them that their approval papers are ready, they ask him to find the employees and so inform them, but he received no such communication in Alexandre's case prior to April 27.

(4) The Respondent offered no credible justification for its unwillingness to rehire Alexandre by submitting a new BCAD badge application on her behalf. As noted above, the Respondent was willing to do this for other employees whose badges expired, and in fact did so in Villain's case.

Significantly, Kendrick testified that the Respondent has no problem helping employees who have missed the deadline for badge renewal and that they are eligible to be rehired. I further note that Supervisor Oviedo wrote in a discipline that Eulen believed in giving employees "a second opportunity," which sentiment Kendrick testified was conveyed to the employee in question. Finally, it is significant that on April 27, a week after Alexandre's badge had expired, Marrast directed Baptiste to call Alexandre and tell her that Eulen had her BCAD badge approval notice. The only logical conclusion is that he assumed she could be reinstated as a Eulen employee; otherwise, he would have been engaging in an exercise in utter futility.

Accordingly, I conclude that the General Counsel has established a prima facie case that Alexandre's discharge on April

28, and the Respondent's refusal to rehire her, were unlawful.

The Respondent's defense relates to the BCAD requirement that all Eulen employees have current ID badges to access secured areas and the Respondent need to have all of its employees to have such access. Accordingly, I will treat this as a "dual motivation" case.

I conclude that the Respondent has failed to meet its burden of persuasion that it would have discharged Alexandre on April 28 and refused to rehire her even in the absence of her union activity. I leave aside the issue of whether the operative date of the Respondent's conduct should be considered April 11, because starting that day it failed to notify Alexandre of her BCAD badge approval in conformity with its normal practices regarding notification to employees.

It is undisputed that Eulen employees need valid BCAD badges to enter secure areas and perform their jobs. The fundamental question is whether Alexandre's failure to renew her badge before its expiration was due to malfeasance on her part or to management's conduct. As discussed above, the Respondent failed to follow its normal procedures by not taking steps to notify Alexandre in a timely fashion that her badge approval notice had been received and that she could go to BCAD to get it renewed. In this regard, the Respondent failed to offer a satisfactory explanation for why, even though the approval notice was received on April 11, management waited until April 27 (a week after the badge expired) to tell her. Thus, the Respondent bore the responsibility for causing Alexandre to lose her badge and the concomitant ability to perform her duties and has not demonstrated a valid reason for such conduct.

I now turn to the Respondent's refusal to submit a new badge application on Alexandre's behalf. The Respondent's designation of Alexandre as ineligible for rehire and its refusal to submit a new application on her behalf were at odds with the way a number of other employees with lapsed badges have been treated. Nor has the Respondent shown that submitting a new application for Alexandre would have been in any way onerous, financially or otherwise. In any event, the Respondent was responsible in the first place for Alexandre's inability to timely renew the badge and cannot turn around and rely on its own improper actions to justify its subsequent refusal to rehire her. So, rewarding the Respondent for its misconduct would be untenable.

The Respondent's defense (Br. 153) that it had knowledge of other employees who went on strike and yet took no action against them is unavailing. The fact that an employer does not discharge all known union supporters is not a valid defense because the discharge of even one employee may have, and may have been intended to have, a chilling effect on other employees' protected activity. *Handicabs, Inc.*, 318 NLRB 890, 897–898 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996); see also *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971); *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954) (discouragement of protected activities may be effected by making some employees "an example.").

Because the Respondent has failed to rebut the General Counsel's prima facie case, I conclude that it violated Section

8(a)(3) and (1) by discharging Alexandre on April 28, and then refusing to rehire her.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: discharged and refused to rehire Joanne Alexandre because she engaged in conduct on behalf of the Union.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Joanne Alexandre must make her whole for any losses of earnings and other benefits suffered as a result of her discharge and its failure to rehire her.

Specifically, the Respondent shall make Joanne Alexandre whole for any losses, earnings, and other benefits that she suffered as a result of her unlawful discharge. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Joanne Alexandre for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Joanne Alexandre for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 12 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent also having discriminatorily failed and refused to reemploy Joanne Alexandre must offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

The Respondent shall expunge from its records any and all references to the discharge of Joanne Alexandre.

The General Counsel (Br. at 56) seeks a posting of a notice

at all of the Respondent's "active job sites." However, inasmuch as the unfair labor practice was confined to only one of the Respondent's multiple locations nationwide, I find that a posting is appropriately limited to that sole location. The General Counsel also requests (*ibid*) that the notice be posted in Haitian Creole and Spanish. For the reasons she states, I will so order, noting that Alexandre's native language is Haitian Creole and that she required an interpreter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, American Sales and Management Organization, LLC d/b/a Eulen America, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to rehire, or otherwise discriminating against employees because they engage in activities on behalf of Service Employees International Union, Local 32BJ or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Joann Alexandre full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Joann Alexandre whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Joann Alexandre, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix," in English, Haitian Creole, and Spanish.¹⁷

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading 'Posted by Order of the National Labor Relations Board' shall read 'Posted Pursuant to a Judge

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Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 30, 2018

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, refuse to rehire, or otherwise discriminate against you because you have engaged in activities in support of Service Employees International Union, Local 32BJ or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Joann Alexandre full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Joann Alexandre whole for any loss of earnings and other benefits she suffered as a result of our discrimination, with interest.

WE WILL remove from our files any references to the Joann Alexandre's discharge, and we will, within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

AMERICAN SALES AND MANAGEMENT
ORGANIZATION, LLC D/B/A EULEN AMERICA

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-163435 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.⁷